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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1962

No. 377

VILLAGE OF BROWN DEER,
a Municipal Corporation,

Petitioner,

vs.

CITY OF MILWAUKEE, a Municipal Corporation; STANLEY J. WITKOWSKI, City Clerk of the City of Milwaukee; TOWN OF GRANVILLE, a body corporate; and JOSEPH F. SHAUGHNESSY, Clerk of the Town of Granville,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF OF THE CITY OF MILWAUKEE, A MUNICIPAL CORPORATION, IN OPPOSITION

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OPINION BELOW

The opinion of the Supreme Court of the State of Wisconsin is reported in Vol. 16 Wis. (2d) at page 206, 114 N.W. (2d) 493. It modified a judgment of the Circuit Court of Milwaukee County, State of Wisconsin, in a declaratory judgment action which was brought by the Village of Brown Deer, petitioner here, against the City of Milwaukee and others.

JURISDICTION

The Supreme Court of Wisconsin in reviewing the decision of the Circuit Court of Milwaukee County determined the application of a specific Wisconsin Statute (Section 62.07(1)(a), Wis. Stats. 1955, printed in "Appendix A", Page 19, of Petitioner's Brief), which established the requirements for effecting a proper petition of annexation. The Wisconsin Legislature within its constitutional authority enacted this statute. By the terms of the statute it specifically delineated the method by which a petition for annexation could be initiated and given effect. The Supreme Court of Wisconsin, in proceedings before it and upon review of a judgment from the Circuit Court of Milwaukee County, *interpreted* the manner in which the Wisconsin Statute should be applied. Petitioner in an attempt to support its petition for a writ here seeks to evolve from the Wisconsin Supreme Court's decision an alleged unconstitutional exercise of authority by that Court in determining how a valid Wisconsin Statute should be applied in annexation proceedings.

QUESTION PRESENTED

Is a Federal question submitted where the Wisconsin Legislature has set up the statutory requirements for the signing of a petition for annexation, which requirements as construed by the Wisconsin Supreme Court must be adhered to by all corporations seeking to be a party to a petition for annexation?

We respectfully submit that *no* Federal question is presented here, let alone a substantial Federal question.

STATEMENT

The statement of facts applicable here is set forth in the Wisconsin Supreme Court's opinion which is includ-

ed with the petition for review as "Appendix A." We respectfully submit that those are the only facts which need be considered in disposing of the petition.

In addition, we should like to call the Court's attention to the fact that on June 28, 1962, respondents herein filed a response to a "Motion for Stay" which was initiated by the above named petitioner and which related to the same subject matter to which its petition for writ of certiorari is addressed. This Court *denied* the motion for stay on June 30, 1962.

The Wisconsin Supreme Court in reaching its conclusion found no reason to consider several other contentions which were advanced by respondents to support the premise that the petitions of annexation were invalid. The Court, having settled the matter as to the requirements for corporate signatures, did not find it necessary to go beyond that point.

We do find it necessary to point out that the minority opinion of the Wisconsin Supreme Court did not claim that the majority opinion results in impairment of constitutional rights as might be drawn from the statement in the petition on page 11.

ARGUMENT

I.

Petitioner has no standing to challenge constitutionality of Wisconsin Statute as interpreted by the Wisconsin Supreme Court.

A statutory requirement in Wisconsin that corporations must act in strict accordance with statutes in connection with matters affecting changes in municipal and political subdivision boundaries of the state, although a

lesser degree of compliance might bind such corporations in purely commercial transactions, obviously raises no *Federal* question. The annexation statutes had previously been construed in Wisconsin in similar fashion with respect to individual signers of annexation petitions who, if able to write, were required to affix their own signatures despite the fact that signatures of authorized agents might bind them in commercial transactions. *DeBauche v. Green Bay, et al.*, 227 Wis. 148, 277 N.W. 147 (1938).

The annexation procedures outlined by the state are clearly within the purview of the Legislature. There are no constitutional rights involved with reference to the procedures by which a municipality or an area may bring itself within the annexation statutes of the State of Wisconsin. Therefore, if the Legislature determines that a particular method shall be employed in consummating a valid annexation, that method must be followed and there are no constitutional implications with respect to such an enactment. Similarly, the prerogative and responsibility of the Wisconsin Supreme Court is to interpret such statutes as the Legislature intended them to apply and it must be presumed that the statutes say what the highest court of the state has interpreted them to say. Clearly as a result of such intepretation, there is no impairment of any constitutional right, either state or Federal.

What petitioner is attacking is not the Wisconsin Supreme Court's decision, but its rationale; it is suggesting that this rationale represents a denial of due process simply because the Court found a difference between the corporation president's authority (apparent or express) to engage in normal commercial transactions and his authority to act in matters affecting governmental and political subdivisions.

We respectfully submit that neither petitioner Brown Deer nor anyone else would seriously contend that a state statute or court decision determining what corporate action is necessary to bind corporate entities in private commercial transactions would violate precepts of the Federal constitution or warrant the exercise of the extraordinary powers of the highest court in the land. The very fact that it seeks here to invoke such powers is recognition by Brown Deer itself of the obvious distinction between political matters affecting units of government and broad segments of the population on the one hand, and commercial transactions affecting only the economic rights of the contracting parties on the other.

Petitioner, being a mere political subdivision of the state, has no standing to challenge the constitutionality of a statute of the state of which it is a part. There can be no difference between such a challenge to the statute as originally enacted or as interpreted by the highest court of the state. Such a political subdivision has no rights, privileges or immunities under the Federal constitution and lacks sufficient interest to urge a Federal constitutional question under the Fourteenth Amendment. *Pawhuska v. Pawhuska Oil & Gas Co.*, 250 U.S. 394 (1919); *Trenton v. New Jersey*, 262 U.S. 182 (1923); *William v. Mayor of Baltimore*, 289 U.S. 36 (1933).

As this Court stated in *Mount Pleasant v. Beckwith*, 100 U.S. 514, at 529:

> "Powers of a defined character are usually granted to a municipal corporation, but that does not prevent the Legislature from exercising unlimited control over their charters. It still has authority to amend their charters, enlarge or diminish their powers, extend or limit their boundaries, consolidate two or more into one, overrule their legislative action *when-*

ever it is deemed unwise, impolitic, or unjust, and even abolish them altogether, in the legislative discretion, and substitute in their place those which are different. Cooley, Const. Lim. (4th ed.) 232.

"Municipal corporations, says Mr. *Justice* Field, so far as they are invested with subordinate legislative powers for local purposes, are mere instrumentalities of the State for the convenient administration of their affairs; * * *" (Emphasis ours)

Petitioner village has attempted to avoid this hurdle by alleging that it is suing as *"parens patriae"* of its residents. To urge this contention it cites *Georgia v. Pennsylvania R. R. Co.*, 324 U.S. 439 (1945). There a *state* was suing as (1) *parens patriae* on behalf of all its citizens and (2) as proprietor of a state institution against railroads allegedly conspiring against the state's economy by fixing rate charges. The court there specifically noted that a "governmental" issue or claim was *not* involved. Here at best the petitioner presumes to act as *parens patriae,* not for all of its citizens, but for those few corporate petitioners who failed to follow the Wisconsin statutory procedure in obtaining proper authority for signing petitions for annexation; moreover, the very essence of the issue is governmental rather than proprietary. Even where a *state* has been permitted to act in its capacity as *parens patriae,* it must be an interest apart from the type of interests held by particular individuals. No interest of this type has been demonstrated or could be demonstrated by the petitioner here.

The instant controversy is between two municipal corporations concerning the proper distribution of purely governmental powers and duties among respective units of the state government. Petitioner village did not sue in a proprietary capacity or in *parens patriae*. No de-

cision has been found in which a municipal corporation complaining of limitations placed by the state, of which it is a part, upon its governmental powers or the area over which it has jurisdiction, has been accorded the status of *parens patriae* or permitted to invoke Federal jurisdiction.

Petitioner village has no standing to raise this question entirely aside from the fact that it is a subdivision of the state; it can demonstrate no harm or damage to its municipal self by reason of any alleged constitutional violation. Neither Brown Deer, nor any other party, has a vested right in the manner in which a corporation is required to affix its signature since this is a matter of statutory control.

In stating the question presented, petitioner attempts to evolve a Federal question. In the formation of the question petitioner allegedly claims that the "state supreme court arbitrarily and unreasonably imposes a more stringent and burdensome standard or test of validity upon corporate signers of such annexation petitions than it imposes upon other corporations acting in the usual and ordinary course of business." The basic and manifest fallacy of petitioner's statement is that the Wisconsin Supreme Court was acting well within its appellate jurisdiction in interpreting and applying the Wisconsin Statute with respect to a petition for annexation. The Court was clarifying the statutory requirements which must be met by a corporation in order to validly execute its acquiescence to annexation. Consequently, the Wisconsin Court could not be acting either arbitrarily or unreasonably.

The difference of opinion on the part of a litigant, and in this instance the petitioner, as to what should or

should not be deemed a statutory requirement for a valid petition in annexation with the highest court of the state can be of no significance. The Supreme Court was not determining what a corporation should or should not do when acting in the "usual and ordinary course of business." It was determining what are the statutory responsibilities of *all* corporations desirous of being participants in valid petitions for annexation under Wisconsin Statutes.

The core of petitioner's complaint is that the Supreme Court of Wisconsin in applying the statute relating to the requirements for a valid petition for annexation enunciated stricter requirements than may be employed in other corporate transactions. However, it must be noted that all corporations which desired to participate in valid annexation proceedings had to meet the same requirements. Petitioner considers that both the Legislature and the Wisconsin Supreme Court are prevented from establishing and interpreting requirements with respect to certain corporate acts which may not be essential in order to carry on other corporate acts. For example, would petitioner complain if the state required of a corporation filing an income tax return to meet certain specified rigid corporate formalities with reference to the execution which were not required in order to complete the documentation for a sale of personal property? Each transaction and the requirements with which it can be consummated, if it affects all corporations in the same manner, is for the Legislature to determine. As long as the act required of the corporation can be performed, it cannot be said that formal requirements are arbitrary, unreasonable or deny due process of law or equal protection of the law to the participating corporation.

II.

The alleged Federal question was not properly preserved or raised timely.

All attempts to raise a Federal question after judgment and upon a petition for rehearing were too late, unless the state court actually entertained the question and decides it. *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 454, 455; *Rooker v. Fidelity Trust Co.*, 261 U.S. 114, 117; *Godchaux Co. v. Estopinal*, 251 U.S. 179, 181. There is the so-called "surprise" exception, which petitioner seeks to apply. However, that exception is applicable only where the first threat to the alleged rights occurred as a result of an unanticipated act of the lower court. See *Herndon v. Georgia*, 295 U.S. 441 (1935). Here, the basis upon which the Supreme Court ultimately disposed of the question involved was hardly one which constituted a surprise decision or determination which could not be anticipated by the parties. On the contrary, the very distinction between political and commercial acts had, as indicated above, previously been invoked by the same court in the construction of the same annexation statutes with respect to the same individuals. *DeBauche v. Green Bay, et al.*, 227 Wis. 148, 277 N.W. 147 (1938). Moreover, this same proposition upon which the decision rests was litigated in and urged upon the lower court. The circuit court saw fit to accept the informal approval of board of directors of corporations although not given in the manner specifically required by the Wisconsin corporation laws. The Supreme Court was urged in briefs on appeal and in course of arguments to reject this position inasmuch as the Wisconsin corporation statutes clearly provided a means for informal approval by written consent of all directors, which means had not been complied with by the corporations here

involved. The distinction between political and commercial transactions previously applied in the *DeBauche Case, supra,* was contended for as being applicable. The issue presented on appeal with respect to the Johnson annexation related to the sufficiency of one of the corporate signatures.

How, therefore, can the Supreme Court's determination of this issue be characterized as a "surprise" decision which could not have been anticipated by the parties in the course of the litigation? They were at all times free to assert the very specious contention now brought forth that such a determination by the Wisconsin Supreme Court would make the law unconstitutional. Not only did petitioner Village of Brown Deer fail to make such assertion prior to the decision of the Supreme Court, but it was raised for the first time in the petition for rehearing and only in a brief *amicus curiae* filed by the present special counsel for Brown Deer who then represented persons not a party to the proceedings. While Brown Deer attempted to adopt the argument of special counsel, it was without legal standing so to do.

At page 9 of the petition, Brown Deer claims that the Wisconsin Supreme Court did, in fact, consider the constitutional question which is here claimed to exist. This claim is without substance. Petitioner rests this claim upon the last paragraph on page 13 of the City of Milwaukee's statement in opposition to petitioner's application for a stay. That paragraph was as follows:

> "When the Supreme Court of Wisconsin interprets the statutes of the state, its decisions become an integral part of the legislation involved. Mindful of this fact, one of the members of the full panel of the Wisconsin Supreme Court which heard oral argument on the same stay and injunction which

> is now being presented to this Court, asked counsel for the petitioner whether he could conceive of any constitutional issue being raised had the Legislature itself expressly stated in the annexation statute that a corporate signature on an annexation petition, in order to be valid, must be specifically authorized by the board of directors, either in a formal meeting, or by written consent signed by all of the directors prior to the filing of the petition. This was in effect what the decision of the Wisconsin Supreme Court found the state statutes (corporate and annexation) did require. Counsel for Brown Deer had no satisfactory answer for this question and can have none."

We respectfully submit that the question posed was, in essence, support for the view that no Federal question existed rather than support for petitioner's claim that the Supreme Court considered a constitutional question. Furthermore, this discussion occurred after the decision of the Supreme Court of the State of Wisconsin had become finalized by denial of a rehearing application and was merely in connection with petitioner's application for a stay. The Wisconsin Supreme Court saw no merit in such a request since the motion for stay was denied. Furthermore, the fact that there was a minority view with respect to whether the stay should be granted did not, either by inference or directly, project a Federal question into the picture.

III.

There is no showing which would warrant the granting of a petition for certiorari under Rule 19 of the United States Supreme Court rules.

The policy of this Court covering review on certiorari is set forth in Rule 19 which reads in part as follows:

"PART V. JURISDICTION ON WRIT OF CERTIORARI

Rule 19.

Considerations Governing Review on Certiorari

"1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

"(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

In addition to presenting a Federal question, a litigant petitioning for a writ of certiorari must establish that the Federal question was decided by the state court and is unique or substantial.

As Chief Justice Holmes stated in his address to the American Law Institute, XI Proceedings of *A.L.I.* 313 (1934):

"That review (certiorari), we must emphasize, is in the interest of the law, not in the interest of particular parties. It is not the importance of the

> parties or the amount involved that is controlling, but the need of securing harmony of decision and the appropriate settlement of *questions of general importance* so that the system of federal justice may be appropriately administered."

Chief Justice Vinson, *Work of the Federal Courts, Address to the A.B.A.*, 69 Sup. Ct. Rep. V (1949) has observed as follows:

> "To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved. . . . A petition for certiorari should explain why it is vital that the question involved be decided finally by the Supreme Court. If it only succeeds in demonstrating that the decision below may be erroneous, it has not fulfilled its purpose."

A case more confined to local import could hardly be stated. Therefore, even if legal standing and proper procedure were not barriers, and a Federal question assumed to be present, the lack of importance of the alleged Federal question would surely result in denial of the petition for a writ of certiorari.

IV.

Petitioner's argument considered.

Petitioner's argument for the writ of certiorari appears to be confined to four contentions. The first relates to the "inhibitions of the Fourteenth Amendment." Petitioner states that a "constitutional mandate to maintain equality before the law and equal laws rests upon the judicial department of government with as much force as upon the other departments." This is a truism. It has no application here. Petitioner merely sets up a valid

legal principle and then attempts to make it appear that this principle has been infringed upon or violated by a decision of the Wisconsin Supreme Court, yet offering no meritorious support for this contention.

The true status of petitioner in these proceedings is found in an admission appearing on page 8 of the petition for writ of certiorari. We quote it:

> "* * * The constitutional rights claimed to be infringed in the present case are those of the taxpayers, and not of the municipality as a political subdivision of the State."

It is apparent from the above quotation that petitioner has no legal standing to present this writ. Petitioner attempts to clothe itself with legal status by suggesting that the constitutional rights of "taxpayers" are infringed upon. Petitioner does not identify who these taxpayers are, nor how they become identical in legal standing with petitioner so as to have a legal status in these proceedings, assuming there were a Federal question.

The action which led to the Wisconsin Supreme Court's decision was instituted by the Village of Brown Deer, a municipal corporation. No other parties plaintiff were included in the action.

The class for whom petitioner indicates it is seeking a review is one to which petitioner does not, has not and cannot belong to as long as it retains its municipal corporate identity. Petitioner by virtue of its creation is a municipal corporation drawing its powers from the laws of the State of Wisconsin. Petitioner is required to execute its own municipal corporate actions in the manner in which the statute prescribes and as interpreted and applied by the Wisconsin Supreme Court. It cannot, therefore, be affected by a determination of the Court

which deals with private corporate affairs that are totally inapplicable to it.

Petitioner's argument narrows itself to the claim that simply because a corporation is required to meet statutory standards with reference to the signing of a petition for annexation which it may not be required to meet in carrying on its general corporate affairs, this procedure results in a basic violation of the rights of such corporation under the Fourteenth Amendment of the United States Constitution. This is totally irreconcilable. It frequently occurs that corporations must meet specific requirements, either under state or Federal statutes, for a particular purpose which they may not have to meet for some other corporate purpose, but this fact in and of itself does not constitute an unconstitutional discrimination or denial of due process or denial of equal protection of the laws.

Petitioner asserts that if the Wisconsin Supreme Court's decision is not reversed, then the Court's decision will cause "great uncertainty, inconvenience and confusion in the conduct of the affairs of private business corporations, particularly in their dealings with governmental entities." We deny that this is the result, but assuming that it were the result, a corporation's remedy would be to the Wisconsin Legislature to deal with the matter as a policy determination and not as a matter of an unconstitutional challenge. If a statute as construed by the Wisconsin Supreme Court may lead to uncertainties in some other cases, such circumstance does not raise a Federal constitutional question which should be decided by this Court. A petition for certiorari is in the interest of the law and not in the interest of particular parties. Certiorari is designed to secure harmony of decision and the appropriate settlement of questions of

general importance so that the system of Federal justice may be appropriately administered as explained by Chief Justice Holmes to the American Law Institute and referred to in this brief.

Another argument which petitioner submits is that the "precedent cited and relied upon by the Wisconsin Supreme Court has been grossly misconstrued and misapplied." We respectfully submit that the Wisconsin Supreme Court as a judicial body is well within its authority in determining what legal precedent it desires to follow.

CONCLUSION

We respectfully submit:

1. Petitioner has no standing to challenge the determination of the Supreme Court of the State of Wisconsin as it may apply to the corporate affairs of private corporations. Petitioner is a municipal corporation and is not within the same class for which it claims the right to act. Further, petitioner cannot validly assert here the doctrine of *"parens patriae."*

2. There is no denial of due process or equal protection of the laws.

3. A requirement that for a corporate act to validly effect changes in municipal or political subdivision boundaries of the state, such acts must be authorized in accordance with the Wisconsin Statutes is not synonymous with the principle that a corporation may be estopped from denying proper corporate authority when dealing with third parties in commercial transactions. This distinction between political and commercial acts has no

relationship to the constitutional challenge here made and, therefore, fails to raise any Federal question.

4. There is neither any Federal question nor a substantial question involved in accordance with the requirements of Rule 19 of the United States Supreme Court.

We respectfully submit that the petition for a writ of certiorari should be denied.

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